Editor's note: Appealed -- stipulated dismissal, sub nom. Cadzow v. Hodel, Civ.No. A 87-253 (D.Alas. Dec. 28, 1987).

EUGENE M. WITT

IBLA 84-249 Decided January 31, 1986

Appeal from a decision of the Fairbanks District Office, Bureau of Land Management, summarily dismissing a protest of Native allotment application F-12613.

Set aside and remanded.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Contests and Protests: Generally

   Prior to the adoption of ANILCA, the mere approval of a Native allotment application did not remove the Department's jurisdiction to reexamine entitlement to an allotment at any time prior to the date the "Native Allotment" is actually issued.

2. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Contests and Protests: Generally

   The legislative approval provisions of sec. 905 of ANILCA apply to Native allotment applications which were approved by BLM prior to the passage of ANILCA if the "Native Allotment" had not yet issued.

3. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Rules of Practice: Appeals: Standing to Appeal

   While a mere trespasser without claim or color of right has no standing to appeal from a substantive decision dismissing his protest under sec. 905(a)(5)(C) of ANILCA, such an individual does have standing to appeal a decision refusing to consider a protest on procedural grounds.

   Village & City Council of Aleknagik (On Reconsideration), 80 IBLA 221 (1984), modified.

APPEARANCES: Eugene M. Witt, pro se; Judith K. Bush, Esq., Alaska Legal Services Corporation, Fairbanks, Alaska, for Elizabeth Peter (Cadzow).

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Eugene M. Witt has appealed from a decision of the Fairbanks District Office, Bureau of Land Management (BLM), summarily dismissing his protest of Native allotment application F-12613 because "[t]he allotment was adjudicated pursuant to the requirements of the Native Allotment Act and approved on May 2, 1975, before the Allotment Protest was received."

Native allotment application F-12613 was filed with BLM February 24, 1970, by Elizabeth Peter (Cadzow). The application described two parcels of land, each approximately 80 acres, in the region of Arctic Village, Alaska, 1/ and was based upon occupancy consisting of hunting and fishing during the summer months beginning in 1964. Appellant filed his protest to this application on May 29, 1981. Appellant asserted that the applicant had not met the 5-year use or occupancy requirement of the Native Allotment Act, that there were no signs on the land of use and occupancy by applicant, and that between August 1, 1968, and September 18, 1980, appellant had used and occupied the land and made improvements upon it, including tent sites, a meat cache, a latrine, and a garbage dump, "without ever seeing the applicant on or in the vicinity of said land." No specification was made as to whether these assertions applied to both parcels or only one. In his statement of reasons on appeal, appellant reasserts his contention that the applicant failed to use or occupy the land for the required period and adds that the allotment was "approved in non-compliance with the Native Allotment Act and its applicable regulations * * *."

The record shows that field examinations of the two parcels included in application F-12613 were conducted on August 9 and 10, 1974. The record also indicates that, by letter dated May 2, 1975, Elizabeth Peter was informed that her allotment application had been approved, a survey of the land would be undertaken, and after the survey had been approved, action would be taken to issue a certificate for the allotment. Since that time, it appears that the application has been awaiting completion and approval of the survey, a necessary step to precisely identify the lands to be conveyed to the applicant.

The primary issue raised in this appeal is whether appellant's protest can have any effect upon the applicant's previously approved application. The parties concerned have all addressed the matter as one arising under subsection 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1982). BLM's decision stated that the protest had been filed pursuant to this provision. On appeal, appellant argues "an inconsistency or a discrepancy" between the decision made in 1975 to approve the application and the statement in BLM's letter that "I had until 'on or before June 1, 1981' to file the protest." In response to the appeal, counsel

1/ As applied for, parcel A is on the bank of Spring Creek near its confluence with the Junjik River on land within secs. 11 and 12, T. 12 S., R. 26 E., Umiat Meridian, Alaska and parcel B is between an unnamed stream which flows into the East Fork Chandalar River and an unnamed lake in sec. 35, T. 13 S., R. 29 E., Umiat Meridian, Alaska.

for Peter points out that the purpose of ANILCA was to speed up and simplify the resolution of pending applications and not to reopen applications already adjudicated and approved. Counsel also points to language in our decision in Village & City Council of Aleknagik (On Reconsideration), 80 IBLA 221 (1984), as requiring a ruling in the allotment applicant's favor. We therefore first address the applicability of ANILCA to this case and the relationship of its provisions to the general protest regulation found at 43 CFR 4.450-2.

The Native Allotment Act granted the Secretary of the Interior authority to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in Alaska and is the head of a family or 21 years of age. 43 U.S.C. § 270-1 (1970). Entitlement to an allotment is dependent upon satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. 43 U.S.C. § 270-3 (1970). See 43 CFR 2561.0-5(a). See also United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981).

The Native Allotment Act was repealed on December 18, 1971, by the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1624 (1982), but applications pending before the Department as of the date of repeal were allowed to proceed to patent. 43 U.S.C. § 1617(a) (1982). Subsequently, section 905(a)(1) of ANILCA provided that (with stated exceptions and exclusions) pending Native allotment applications for land that was "unreserved on December 13, 1968, or land within the National Petroleum Reserve -- Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following December 2, 1980 * * *." 43 U.S.C. § 1634(a)(1) (1982). One of the exceptions, section 905(a)(5)(C), provides that the approval does not apply if, within the specified 180 days: "A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity." 43 U.S.C. § 1634(a)(5)(C) (1982).

[1] As noted above, BLM approved Peter's allotment application on May 2, 1975. Such approval, however, did not end the Department's jurisdiction over the land. As noted in State of Alaska, 43 IBLA 318 (1980), jurisdiction passes only upon issuance of the instrument entitled "Native Allotment." Id. at 320-22. Thus, in Leo Titus, Sr., 89 IBLA 323, 92 I.D. 578 (1985), we held that the fact that the State office had approved an allotment application would not prevent BLM from later determining that the allotment should be subject to an easement for a linear right-of-way, so long as the actual "Native Allotment" had not issued. Id. at 327-28, 92 I.D. at 581.

Our decision in Leo Titus, Sr., supra, did not involve consideration of the effect of the legislative approval of pending Native allotment applications provided by section 905(a)(1) of ANILCA since the land involved in Titus had been selected by the State of Alaska before December 14, 1968, and was thus not subject to automatic approval. See 43 U.S.C. § 1634(a)(4) (1982).

We did, however, have occasion to examine the applicability of the legislative approval provisions in Village & City Council of Aleknagik (On Reconsideration), supra. The decision in Aleknagik involved a Native allotment application which had been contested by BLM. After a hearing, Administrative Law Judge E. Kendall Clarke dismissed the contest as to part of the land involved and approved the allotment application to the extent that it did not conflict with two other occupied parcels. This decision, dated March 28, 1980, was later supplemented by decisions dated April 17 and June 1, 1980, to more accurately describe the lands. No appeal from the decisions was prosecuted.

Subsequent to the adoption of ANILCA, the Village & Council of Aleknagik, inter alia, filed protests to the allotment, purportedly under the provisions of 43 U.S.C. § 1634 (1982). BLM dismissed these protests and in Village & City Council of Aleknagik (On Reconsideration), supra, this Board affirmed its actions. In reviewing section 905 of ANILCA, the Board noted:

> The legislative history of ANILCA reflects that the intent of section 905 is to provide an expedited legislative conveyance procedure and promote allotment finality under ANCSA, 43 U.S.C. § 1601 (1982). See S. Rep. No. 413, 96th Cong., 2d Sess. 237 (1980). This report explained that the Department was requiring the time-consuming and expensive process of field examination and adjudication on a parcel-by-parcel basis of all timely allotment applications. Thus, Congress enacted section 905 providing for the prompt resolution of pending allotment applications to resolve Alaska's uncertain land ownership status caused by the tedious parcel-by-parcel adjudications. This Board can only conclude that Congress did not intend the 180-day protest rights providing for a hearing in section 905 to apply to an already adjudicated and approved allotment application. See Mary Olympic (On Reconsideration), 65 IBLA 26 (1982), appeal filed, Civ. No. A 82-396 (D. Alaska Oct. 8, 1982).

Id. at 222.

Initially, it must be noted that the Board's decision in Mary Olympic, supra, cited with approval in Aleknagik, was reversed by the United States District Court for Alaska in Olympic v. United States, 615 F. Supp. 990 (1985). The court held that, in light of section 905(a)(1) of ANILCA, which granted legislative approval to Native allotment applications "pending on or before December 18, 1971" (emphasis supplied), applications which had been rejected were, nevertheless, subject to the legislative approval provision. 2/ While this does not necessarily establish that applications which

2/ We note, however, that not all rejected applications are necessarily subject to this approval. Thus, S. Rep. 413 (Nov. 14, 1979) which accompanied H.R. 39 (the bill eventually enacted as ANILCA) discussed this aspect as follows:

"An amendment to section 905 clarifies that the purview of the section includes all Alaska Native allotment applications which were pending before

were approved are also subject to the legislative approval process, we think that the court's decision does justify a reexamination of our Aleknagik holding.

[2] Our review of the legislative history now convinces us that our original holding in Aleknagik must be substantially modified. There is no question that, as stated in Aleknagik, Congress desired to speed up the allotment process, not only with a view to aiding allotment applicants in obtaining their allotments but also with the aim of expediting village and regional corporation conveyances under ANCSA, which were being delayed by the uncertain status of allotment applications. In S. Rep. No. 413 (Nov. 14, 1979), Congress described in some detail the genesis of these problems and the solution being adopted:

> Until shortly before the passage of the Alaska Native Claims Settlement Act, rural Alaska Natives were generally unaware of the availability of allotments. A longstanding failure to implement the 1906 Act, cultural and language barriers, and the isolation of most Alaska villages resulted in a low application rate until the late 1960's. In 1970, an allotment assistance program jointly implemented by the Rural Alaska Community Action Program and the Bureau of Indian Affairs, began to reach Natives residing in remote villages.
>
> The resultant increase in the application rate left over 7,400 allotment claims to be adjudicated following the passage of the Alaska Native Claims Settlement Act. Most applicants had long been qualified for allotments, but had neither the means nor the technical knowledge necessary to initiate the process earlier. The complexities of allotment adjudication, as well as uncertainty introduced by litigation, have slowed the allotment process and pose a risk that multiple re-adjudications of certain applications will be necessary.
>
> The pendency of large numbers of allotment applications will impede timely conveyance of lands to Native village corporations, notwithstanding other statutory measures to expedite such conveyances. Over ninety percent of the village corporations have "top-filed" allotment applications falling within their selections. Presently, approximately [sic] discrete, top-filed allotment parcels remain to be adjudicated. The allotment applications have precedence over the corporate selections. If an

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the Department of the Interior 'on or before' December 18, 1971. The amendment clarifies that applications which were erroneously rejected by the Secretary prior to December 18, 1971, without an opportunity for hearing shall be approved or adjudicated by the Secretary pursuant to the terms of the section."

S. Rep. No. 413 at 238. Thus, if a Native allotment had been rejected prior to 1971 for reasons which did not involve a disputed issued of fact necessitating a hearing under Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), section 905 would not apply.

> allotment application is approved, the alloted acreage is not taken from the corporation's entitlement. If an allotment application is eventually rejected, the top-filed land goes to the corporation under its secondary selection.
>
> As a result of the top-filing process, neither the boundaries of the village-owned lands nor the allotment inholdings can be determined with finality until each top-filed allotment within a corporation's selection is adjudicated. The statutory approval implemented by Section 905 is intended to summarily approve allotments in all cases where no countervailing interest requires full adjudication. It is anticipated that final conveyance of land to village corporations will thereby be expedited and that the village reconveyance plans required by Section 14(c) of the Alaska Native Claims Settlement Act will be made less burdensome and confusing. [Emphasis supplied.]

Id. at 237-38.

As we noted above, the mere fact that an allotment application had been "approved" did not conclusively mean that the "Native allotment" would issue. Until actual issuance, the Department had authority to reexamine and, if appropriate, readjudicate whether the conditions of the Native Allotment Act had been met. See Leo Titus, Sr., supra; State of Alaska, supra. It seems reasonably clear that Congressional concern as to the lengthy process of allotment adjudication extended not only to third party challenges but to Departmental adjudication as well. Thus, our reading of section 905 leads to the conclusion that Congress intended to make its legislative approval as final as actual issuance of the "Native Allotment," removing the Department's general authority to reexamine the question of entitlement in all cases where the allotment was subject to legislative approval, and leaving the Department the purely ministerial task of surveying the allotment.

Seen in this light, we now find the Board's decision in Aleknagik holding that section 905(a) was not applicable to "approved" allotments was too broad. That section is not applicable to those allotments for which the actual "Native Allotment" had issued, as they were already beyond the Department's adjudicatory jurisdiction. It did apply, however, to those allotments which had been "approved" but for which no "Native Allotment" had issued so as to remove from the Department its authority to reexamine entitlement or further condition the scope of the grant provided no protest was filed under the Act within 180 days of ANILCA's passage. Accordingly, we expressly modify over decision in Village & Council of Aleknagik (On Reconsideration), supra, to reflect this interpretation. See also Alaska v. Heirs of Dinah Albert, 90 IBLA 14 (1985).

In this case, appellant's protest was summarily dismissed because the allotment had been approved on May 2, 1975, before the protest was filed, and was, therefore, not subject to the protest provisions of section 905(a)(5)(C), 45 U.S.C. § 1634(a)(5)(C) (1982). We cannot agree.

Had ANILCA never been adopted, appellant's protest would have been based on 43 CFR 4.450-2. That regulation provides that:

> Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.

It is true that the Board has long held that a protest can be filed only to an action "proposed to be taken." Objections filed after the action complained of has occurred cannot be treated as a "protest," though they might be considered an appeal if the individual could show that he or she was a "party to the case" who had been "adversely affected." See generally, Goldie Skodras, 72 IBLA 120, 122 (1983); In re Pacific Coast Molybdenum, 68 IBLA 325, 330-34 (1982); Duncan Miller (On Reconsideration), 39 IBLA 312 (1979). In the instant case, however, while the Department had "approved" the allotment application it had not yet issued the "Native Allotment." Until such time as the Department issued the "Native Allotment" it retained the authority to reexamine entitlement to the land. Therefore, a protest under 43 CFR 4.450-2 would properly lie until issuance of the "Native Allotment." 3/

ANILCA impacts on the provisions of 43 CFR 4.450-2 in two different ways. First, it imposes a time limit during which any protest to entitlement must be filed. Second, it limits protests to those individuals and entities who can make the showings described in section 905(a)(5). 4/ It does not, however, prevent an individual who can make the requisite showings under section 905(a)(5), from protesting an "approved" application before actual issuance of the "Native Allotment," with one exception. If an individual has already participated in an adjudication of the allotment application and, upon receiving an adverse decision, either failed to appeal or exhausted his appeals without favorable results, the individual may not file a further protest. This exception, however, derives not from section 905(a) but from considerations of administrative finality and repose. See generally Nequoia Association v. Department of the Interior, Civ. No. C-82-1084W (D. Utah Dec. 27, 1985). Indeed, this rule was implicitly recognized in Aleknagik in denying appellants' claim therein that due process required a rehearing in that case. In Aleknagik, the Board found appellants had been afforded notice and an opportunity to participate in a contest of the disputed Native allotment application but had filed no appeal from the decision approving the allotment. In the instant case, however, there is no evidence that appellant Witt participated in or was informed of the approval of the allotment application in 1975. Thus, he would not be barred from protesting legislative approval of the allotment under section 905(a)(5)(C).

3/ It is true that, technically, the protest would be directed to the issuance of the "Native Allotment" and not to approval of the Native Allotment application. This is a distinction, however, of no moment.

4/ The discussion in the text assumes that section 905(a)(3), (4), and (6), do not apply since they preclude legislative approval if applicable.

[3] We recognize that in Fred J. Schikora, 89 IBLA 251 (1985), we held that one who is a mere trespasser upon the land without claim or color of right does not possess sufficient interest to maintain standing to appeal from a decision dismissing a protest and holding a Native allotment application for approval. Admittedly, we cannot discern whether appellant possesses any interest sufficient to appeal from a substantive denial of his section 905(a)(5)(c) protest. What we have here, however, is not a substantive denial of a protest but a procedural one. In such a situation even a trespasser would, under section 905(a)(5)(C), have standing to appeal from a failure to deal with his protest in a manner in conformity to the law.

In light of the above, we must conclude that the State Office erred in failing to determine whether, consistent with section 905(a)(5)(C), appellant owned improvements on the land and, if he did, readjudicating the allotment application under the Native Allotment Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further action consistent with the foregoing.

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James L. Burski
Administrative Judge

We concur:

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Gail M. Frazier
Administrative Judge

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R. W. Mullen
Administrative Judge